IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Opening Brief of Appellant, Tri-State Mutual Grain Dealers Fire Insurance Company

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

Opening Brief of Appellant, Tri-State Mutual Grain Dealers Fire Insurance Company.

Introductory Statement.

This is an appeal by Appellant, Tri-State Mutual Grain Dealers Fire Insurance Company from a judgment entered in the United States District Court, Southern District of California, Southern Division, against it and in favor of plaintiff, C. R. Morris and Constance B. Honaker (now Appellants and Appellees). [Tr. 47, 59.] Plaintiffs C. R. Morris and Constance B. Honaker (now Appellants) also appeal from that portion of said judgment in favor of Appellees, The Home Insurance Company and the Canadian Fire Insurance Company, and against them and each of them.

Statement of Jurisdictional Facts.

Plaintiffs C. R. Morris and Constance B. Honaker on November 23, 1956, commenced joint action against this Appellant and the Appellees, The Home Insurance Company and The Canadian Fire Insurance Company, by filing complaint in the Superior Court of the State of California, in and for the County of San Diego. Appellee, The Canadian Fire Insurance Company, appeared in the District Court of the United States, Southern District of California, Central Division by petition for removal. It appears from the petition and plaintiff's complaint that both plaintiffs were citizens and residents of the State of California and that all of the defendants were citizens of other states, this Appellant being a citizen and resident of the State of Minnesota and the defendant, Appellee, the Home Insurance Company, a citizen and resident of the State of New York and defendant, Appellee, The Canadian Fire Insurance Company, a citizen and resident of the Dominion of Canada, and that the amount in controversy, exclusive of interests and costs, exceeded the sum or value of $3,000.00. [Tr. 3-5, 6-11, 48.]

All parties appeared in the District Court without objection and the Court had jurisdiction. (28 USCA 1332 (a), 1441, 1446.)

This Court has appellate jurisdiction to review the judgment herein. (28 USCA 1291, 1294.)

Statement of the Case.

This case was tried entirely upon the pleadings, consisting of plaintiffs' complaint [Tr. 6], answer of Appellee, The Canadian Fire Insurance Company [Tr. 11], answer of Appellee, The Home Insurance Company [Tr. 24], and answer of this Appellant, Tri-State Mutual Grain

Dealers Fire Insurance Company, as amended [Tr. 19, 39], and upon amended pre-trial stipulation [Tr. 32-38], and upon oral stipulations and stipulated exhibits at the trial [Tr. 68-76], which conclusively show:

That on the 27th day of September, 1955, a building located upon real property described as the north 140′ of Riverview Farms in the County of San Diego was damaged by fire and that the loss to said property by said fire was in the sum of $7,890.00. [Tr. 32-35, 48.]

At the time of the loss by fire the property was in possession of Rose W. Gilmore as purchaser from Aubrey L. Owens and Emil T. Owens under a pending escrow agreement that had not been closed and deed from Owens to Gilmore had not been delivered. [Tr. 32-48, Pltf. Ex. I.]

At the time of the fire the property was encumbered by a first and second deed of trust, the plaintiff C. R. Morris being the beneficiary of the first deed of trust and plaintiff Constance Honaker being the beneficiary of the second deed of trust. [Pltf. Exs, A, B.] Both deeds of trust were executed and recorded prior to the agreement to purchase by the said Rose Gilmore. [Tr. 34.]

Prior to the loss by fire and prior to the purchase agreement and possession of Rose W. Gilmore this Appellant had executed and delivered to Aubrey L. Owens and Emil T. Owens its Standard Fire Insurance policy, insuring them against loss by fire to the property in question to the amount not exceeding $7,000.00. [Tr. 71, Pltf. Ex. C.]

Attached to and a part of said policy was a "MORTGAGEE CLAUSE WITHOUT FULL CONTRIBUTION" which provided that, subject to the terms set forth under said rider, loss under the policy, on buildings only, should be payable first to plaintiff, C. R. Morris, and secondly to plaintiff, Con-

stance B. Honaker, as their interests may appear. The clause provided that the term "mortgagee" included deeds of trust and interests therein. Said mortgage clause further provided *in haec verba* as follows:

> "This insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by the use of the premises for purposes more hazardous than are permitted by this policy. * * *
>
> "This company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, under policies issued to, held by, or payable to the mortgagee, whether collectible or not."

The Standard Policy provisions contained in the policy and above referred to are as follows:

> "This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

Appellant, Tri-State, admitted that as to the interests of the mortgagees, Morris and Honaker only, that its policy was in full force and effect at the time of the fire.

Prior to the fire, Appellees, The Home Insurance Company and The Canadian Fire Insurance Company had each executed and delivered to Rose W. Gilmore, their reepective policies of insurance, insuring said Rose W. Gilmore by their separate policies, each in an amount not

to exceed $5,000.00 against loss by fire to the building in question. These policies were Standard Fire Policies and each contained a mortgage clause identical with the one on the Tri-State policy as summarized above, making loss payable first to plaintiff, Morris, and secondly to plaintiff, Honaker, as their interests may appear. [Tr. 50-52, Pltf. Exs. D, E.]

These policies were delivered to Rose W. Gilmore prior to the fire, and each defendant collected and received from Rose W. Gilmore a premium for their respective insurance policies, and retained the same until March 5, 1956, and after they had received notice of the loss when they each sent cancellation notices to Rose W. Gilmore, but each retained the premium earned on their respective policies to the date of cancellation. [Tr. 51, 52; Pltf. Exs. F, G, H.]

Plaintiffs Morris and Honaker, maintaining that all three of the policies were in effect as to them under the provisions of the aforesaid mortgage clause, brought their action against all three of the insurance companies. The named insureds, Owens and wife in the Tri-State policy, and Rose W. Gilmore in the Home and Canadian policies were not parties to the suit.

Appellant Tri-State admitted that, under the special provisions of the mortgage clause, its policy was in effect as to the plaintiffs at the time of the fire, but contended that its liability was limited by the terms of the policy and this clause to that proportion of the loss which the amount of its policy bore to all insurance covering said property,

that is, that proportion of the loss which its policy of $7,000.00 bore to the total of all three policies, or $17,-000.00, or 7/17ths of the loss.

Appellees, Home and the Canadian, claimed in effect that their policies were void *ab initio,* contending that Rose Gilmore had no insurable interest in the property at the time of the fire. Said Appellees raised several other defenses relating to conditions subsequent which we do not believe are material in our brief.

Specification of Errors.

1. The trial court erred in entering judgment against this Appellant in the amount of said judgment and in not limiting this Appellant's liability and the judgment against it to its proportion of the loss as provided for in the policy and mortgage clause.

2. The court erred in its conclusion of law No. 2 in concluding that at the date of the fire loss Aubrey L. Owens and Emil T. Owens had the only insurable interest in the property involved and that Rose Gilmore had no insurable interest therein.

3. The court erred in making its conclusion of law No. 4 to the effect that the policies of the Home Company and the Canadian Company were not to become effective until the escrow closed for the reason that there is not an iota of fact either in the stipulations or the findings to support said conclusion.

ARGUMENT.

Synopsis.

(a) Rose Gilmore clearly had an insurable interest at the time of the fire.

(b) Plaintiffs Morris and Honaker, as beneficiaries of their respective trust deeds, had an insurable interest.

(c) The court erred in making its conclusion of law No. 4.

(d) This Appellant's liability.

This appeal is predicated upon the single question of whether or not this Appellant was entitled to have its liability limited to that proportion of the loss that the amount of its policy bore to the total insurance on the property payable to the trust deed beneficiaries, and all of the foregoing specifications of error apply to this one proposition.

It would seem that if plain and unambiguous language of a contract is to be given any effect, and if the statutes and established law are followed, there can be but one conclusion and that is that the trial court erred in this respect.

It seems clear that if the policies of insurance executed and delivered for a valuable consideration to Rose Gilmore with loss payable to the plaintiffs herein were valid and subsisting insurances at the time of the fire that the answer is yes, the court erred. All three of the policies were practically identical in form with the identical terms and conditions as related to the plaintiffs

herein. No one could suggest any ambiguity in the clear language of the pro rata provision of the mortgagee clause, "that the company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property under policies issued to, held by, or payable to the mortgagee, whether collectible or not." It therefore follows that if there was other insurance issued to, held by or payable to the mortgagee that the trial court erred in not limiting Appellant's liability to the proper pro rata.

It is clearly apparent that the trial court's error stems entirely from his conclusion that Rose Gilmore had no insurable interest in the property involved at the time of the fire, and therefore that the policies of the Home and the Canadian were void *ab initio*.

This conclusion, in the face of definite stipulation of facts, was clearly erroneous and contrary to the settled law in California and this district.

(a) Rose Gilmore Clearly Had an Insurance Interest at the Time of the Fire.

Under the stipulations and findings Rose Gilmore was in possession of said premises as a purchaser under a pending escrow agreement and had paid a valuable consideration and had procured insurance in her name with loss payable to the plaintiffs which insurance was effective September 20, 1956, the fire occurring September 27, 1956.

She had paid a premium for these policies and they were in her possession at the time of the fire. Plaintiffs were beneficiaries under valid and subsisting deeds of trust at the time of the fire.

The nature and extent of the interest of a purchaser in possession under a contract for the purchase and sale of real property has in the past been the subject of many decisions both in this jurisdiction and elsewhere, but it seems that the matter has been entirely set at rest and epitomized in Section 1662 of the Civil Code of California, Uniform Vendor and Purchaser Risk Act, enacted in 1947.

This act provides in part, as follows:

> "Any contract hereafter made in this State for the purchase and sale of real property shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:
>
> "* * * (b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid. * * *"

This Code section, being of recent enactment, has not been cited, except in one case, that of *Ward v. Union Bond and Trust Company,* 243 F. 2d 476, decided by this court on April, 1957, where the court said (footnote 3): "California Civil Code, Sec. 1662, the Uniform Vendor and Purchaser Risk Act, puts the risk of loss on the purchaser if either the title or the possession has been transferred."

In the present case, the possession had been transferred and Gilmore was in possession as a purchaser.

With the clear and unequivocal language of the Code and this court's interpretation as above quoted, it would seem unnecessary to quote from the various decisions both in this jurisdiction and elsewhere, all holding insurance cases that the purchaser in possession has an insurable interest, some even holding that he is, for insurance purposes, the sole and unconditional owner, and we will not quote from other decisions, but for the purpose of the record, cite a few:

See:

Estate of Reid, 26 Cal. App. 2d 362, 79 P. 2d 471;

Hartford Fire Ins. Co. v. Cagle, 249 F. 2d 241;

Central Manufacturers Mutual Ins. Co. v. Jim Dandy Markets, Inc. 77 Fed. Supp. 171 (S. D. Cal.), affirmed 172 F. 2d 616 (9th Cir.).

It should go without saying that if the risk of loss to the property falls upon the purchaser that the purchaser has an insurable interest. It would serve no purpose to cite any of the innumerable cases since the beginning of insurance law, defining and applying insurable interest as California statutory law has completely spelled out the rule relating thereto.

Sections 281 and 282 of *California Insurance Code* provide as follows:

"281. Every interest in property, or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

"282. An insurable interest in property may consist in:

1. An existing interest;

2. An inchoate interest founded on an existing interest;

or,

3. An expectancy, coupled with an existing interest in that out of which the expectancy arises."

The trial court clearly erred in holding that Rose W. Gilmore had no insurable interest in the property at the time of the fire.

We believe the trial court's error arose entirely from his failure to recognize the difference between an insurable interest that is sole and unconditional and an interest that is not sole and unconditional, and his misconception of the holding in the case of *Vierneisel v. Rhode Island Insurance Company,* 77 Cal. App. 2d 229, 175 P. 2d 63. This appears clear from the trial court's memorandum opinion. [Tr. 42.]

In the *Vierneisel* case no point whatsoever was involved as to the insurable interest of the purchaser in possession under a contract, as the case makes it clear that at the time of the fire the purchaser had taken no steps nor performed any act creating an interest in the property in him. On the day before the fire, the owner had executed written escrow instructions and placed them with the policy in the hands of the escrow holder. The purchaser had taken no steps and took none until several months after the fire toward accepting the proposal of the seller.

There was no discussion whatsoever of a purchaser in possession in this case, the sole question being whether the owners were the sole and unconditional owners at the time of the fire.

This case has been considered and distinguished by this court in the case of *Central Manufacturers Mutual Ins. Co. v. Jim Dandy Markets, Inc.,* cited *supra,* wherein Judge Yankwich, at page 173 of 77 Fed. Supp. in holding that the vendee in possession has an insurable interest in the property has this to say about the *Vierneisel* case:

> "Under California law, the vendee under a conditional sales contract has an insurable interest, as the sole owner of the property. Kaufman v. All Persons, etc., 1911, 16 Cal. App. 388, 117 P. 586; Kavanaugh v. Franklin Fire Ins. Co., 1921, 185 Cal. 307, 311, 312, 197 P. 99. Such title is not, in any way affected by the fact that the assignment is executory, so far as the vendee is concerned, and is dependent for full execution upon the performance by it of certain condition precedent, i.e., the payment of the full purchase price. For this reason, cases like Vierneisel v. Rhode Island Insurance Company, 1946, 77 Cal. App. 2d 229, 175 P. 2d 63, relied on by the plaintiffs do not apply. There, the court was dealing with an outright sale of real property which was not to become effective until the deed had actually been delivered. When this is the case, delivery into escrow does not pass title and any loss by fire is payable to the owner who remains, until the delivery of the deed, the sole owner of the property. Here the vendee was in possession and all that remained to be done by him was the payment of the price."

This court, in affirming Judge Yankwich's decision in 172 F. 2d 616, at page 618, said:

> "In California, Jim Dandy Markets, as conditional vendee in possession of personalty, had an insurable interest as the sole owner of the property within the meaning of the policies issued by Cen-

tral and Indiana. Savage v. Norwich Union Fire Insurance Society, 125 Cal. App. 330, 13 P. 2d 955; Votaw v. Farmers Automobile Inter-Insurance Exchange, Cal. Sup., 85 P. 2d 872. The vendee bears the risk of loss and is entitled to recover on his policies with appellant insurance companies."

(b) Plaintiffs Morris and Honaker, as Beneficiaries of Their Respective Trust Deeds, Had an Insurable Interest.

Perhaps we have permitted ourselves to become unduly diverted from the fundamental issue in this case, because of the trial court's basing its decision on the question of whether Rose W. Gilmore had an insurable interest. Although we believe we have amply demonstrated that she did have a substantial insurable interest, in the property at the time of the fire, this perhaps is not too important after all.

After all, the real point in issue was whether or not the plaintiffs had insurance other than that of this Appellant under policies issued to, held by or payable to them whether collectible or not.

Clearly no contention can be made that they did not have an insurable interest which consisted of the right to protect themselves by insurance against the loss of the security provided by their trust deeds.

The mortgage clause attached to all of the policies contains special provisions relating to mortgagee only, providing, among other things that the insurance as to the interest of the mortgagees should not be invalidated by any act or neglect of the mortgagor or owner and, provided that in case the owner should fail to pay the premium, the mortgagee agreed to pay the same on demand.

We have a situation here where Rose W. Gilmore, the purchaser in possession under the escrow contract, had procured insurance effective prior to the date of the fire for her benefit and for the benefit of the plaintiffs. She had paid for this insurance and received and had in her possession the policies of the Appellees, The Home and The Canadian, and there had been no repudiation of these insurance contracts prior to the fire by anyone and in fact, the said Appellees permitted the policies to run for many months after the fire and upon cancellation retained the premium earned from the inception date of the policy to the date of the cancellation.

That the plaintiffs did not receive delivery of the policies prior to the fire is immaterial. Rose Gilmore had entered into contract with these insurance companies for their benefit. This court in the case of *Tarleton c. De Veuve,* 113 F. 2d 297, opinion by Judge Garrecht, in speaking of a similar situation, said:

> "We now examine the rights of the mortgagee, appellant Tarleton, under this policy. That appellant Tarleton was unaware of the existence of the insurance is of no import. To enable a mortgagee named in a mortgage clause to enforce a policy it is not essential that he had knowledge of its existence before loss. Union Institution for Savings v. Phoenix Ins. Co., 196 Mass. 230, 81 N. E. 994, 995, 14 L. R. A., N.S., 459, 13 Ann. Cas. 433; Federal Land Bank v. Atlas Assur. Co., 188 N. C. 747, 125 S. E. 631. Nor was acceptance of the policy required by the mortgagee to complete the contract. Federal Land Bank v. Atlas Assur. Co. supra."

The trust deed beneficiaries, the plaintiffs, had separate and distinct insurable interests in the property which they could insure unaffected by the rights of either the buyer or the seller. This court said in *Tarleton v. De Veuve, supra:*

> "The viewpoint of the majority of the courts is contrary to the contention of the appellees that the rights of a mortgagee under a 'standard' or 'union' mortgage clause are merely those of a third party beneficiary. With but few exceptions, the courts are in agreement that where the interest of a mortgagee is protected by a standard or union mortgage clause, there exists an independent contract between the mortgagee and the insurer, and the mortgagee's rights under the mortgage clause cannot be invalidated by any act or neglect of the mortgagor or owner.
>
> "In New York Underwriters Ins. Co. v. Central Union Bank, 4 cir., 65 F. 2d 738, 739 (certiorari denied, 290 U. S. 679, 54 S. Ct. 102, 78 L. Ed. 585), the court had this to say: 'The mortgage clause protects the mortgagee against any act or neglect of the mortgagor, whether prior or subsequent to its execution.' Syndicate Ins. Co. v. Bohn (C. C. A. 8th) 65 F. 165, 27 L. R. A. 614.
>
> "In Witherow v. United American Ins. Co., 101 Cal. App. 334, 340, 281 P. 668, 671, a case in which there was involved a mortgage clause containing a provision excepting the mortgagee's interest from being affected by any act or neglect of the mortgagor, the following language was used by the court:
>
> "Where an insurance policy is written in favor of an insured and has attached to it a mortgage clause providing that the loss be payable to the

> mortgagee as his interest may appear, there are, in effect, two separate contracts, one between the insurer and the mortgagor or owner of the property, and the other between the insurer and the mortgagee. The mortgagor may lose his right of recovery on the policy without affecting the mortgagee's rights. Seccombe v. Glens Falls Ins. Co., 45 Cal. App. 611, 188 P. 305; Welch v. British American Assur. Co., supra (148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396)."

In the case of *Witherow v. United American Ins. Co.*, 101 Cal. App. 334, 281 Pac. 668, the court said at page 340:

> "Where an insurance policy is written in favor of an insured and has attached to it a mortgage clause providing that the loss be payable to the mortgagee as his interest may appear there are, in effect, two separate contracts, one between the insurer and the mortgagor or owner of the property and the other between the insurer and the mortgagee. The mortgagor may lose his right of recovery on the policy without affecting the mortgagee's rights. (Seccombe v. Glens Falls Ins. Co., 45 Cal. App. 611 (188 Pac. 305); Welch v. British American Assur. Co., supra.)"

(c) The Court Erred in Making Its Conclusion of Law No. 4.

In this conclusion of law, the court concluded that the Home and the Canadian policies were not to become effective until the close of the escrow. Little need be said about this conclusion. The court apparently drew this conclusion from the thin air. There is not a word of the stipulations, oral or written, or in any of the documents introduced to warrant this conclusion. The findings and the stipulations are conclusive that the Canadian and

Home policies were both conditioned to become effective on September 20, 1955 and there is not a single word or inference to warrant a varying of the terms of these documents. The court apparently again let the *Vierneisel* case influence him as these were the facts in the *Vierneisel* case, but not in the instant one.

(d) This Appellant's Liability.

This Appellant admitted that as to the interests of the plaintiff's only, it was liable under its policy, but only to that proportion that its policy bore to all other insurance. Its liability was several and as said in the case, *Globe National Fire Ins. Co. v. American Bonding and Casualty Co.,* 217 N. W. 268, 56 A. L. R. 463:

> "Its liability was fixed by the face of its policy and its proportionate relation to the co-insurance. The liability of the co-insurers to the insured was several and not joint. Neither had any interest in the liability of the other except a mathematical one."

In conclusion Appellant respectfully submits that these stipulated facts conclusively show that at the time of the fire there was in effect insuring the plaintiffs, three valid and subsisting fire insurance policies totaling $17,000.00 and that this Appellant's proportion of the loss cannot exceed that proportion that its policy of $7,000.00 bears to $17,000.00.

Respectfully submitted,

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